

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

DAVID JOHN THORKELSON, as
Personal Representative of the Estate
of Debi Lyn Thorkelson,

Plaintiff,

v.

Case No.: 2:19-cv-263-FtM-38MRM

CARMINE MARCENO and
ROBERT CASALE,

Defendants.

REPORT AND RECOMMENDATION

Pending before the Court is Defendants' Motion to Tax Costs, filed on August 25, 2020. (Doc. 72). Specifically, Defendants Carmine Marceno and Roberto Casale move this Court, under Fed. R. Civ. P. 54(d), for an award of certain costs necessarily incurred by Defendants in this case, totaling \$54,330.64. (*Id.* at 2). Although the motion states that Plaintiff opposes the requested relief, (*see id.* at 3), Plaintiff David John Thorkelson has not filed a timely response and the deadline by which to do so has lapsed, *see* M.D. Fla. R. 3.01(b). Nevertheless, for the reasons set forth herein, the Undersigned respectfully recommends that Defendants' Motion to Tax Costs be **DENIED** without prejudice.

BACKGROUND

On July 31, 2020, the Court granted summary judgment in favor of Defendants. (Doc. 68). On August 17, 2020, Plaintiff filed a Notice of Appeal to the

United States Court of Appeals for the Eleventh Circuit. (Doc. 69). The following day, the Clerk of Court entered judgment for Defendants. (Doc. 70). Subsequently, Defendants filed the motion *sub judice*, requesting that the Court tax costs against Plaintiff in the amount of \$54,330.64. (Doc. 72 at 2).

LEGAL STANDARDS

A notice of appeal is significant in that it generally divests a district court of jurisdiction over the matter appealed. *Green Leaf Nursery v. E.I. DuPont De Nemours & Co.*, 341 F.3d 1292, 1309 (11th Cir. 2003) (quoting *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982)). The district court may, however, retain jurisdiction to consider matters collateral to those on appeal, including motions for attorney's fees and costs. *See Elver v. Whidden*, No. 2:18-CV-102-FTM-29CM, 2019 WL 718536, at *1 (M.D. Fla. Feb. 20, 2019) (citing *Mahone v. Ray*, 326 F.3d 1176, 1179 (11th Cir. 2003); *Briggs v. Briggs*, 260 F. App'x 164, 165 (11th Cir. 2007)).

Nevertheless, it is well-settled in this district that the Court's ability to consider such motions is discretionary. *See, e.g., id.* (quoting Fed. R. Civ. P. 54(d) Advisory Committee Note to 1993 Amendment and collecting cases); *see also Sowers v. R.J. Reynolds Tobacco Co.*, No. 3:09-CV-11829-J-WGY-JBT, 2018 WL 11025038, at *1 (M.D. Fla. Aug. 6, 2018). Indeed, Fed. R. Civ. P. 54(d) Advisory Committee Note to 1993 Amendment states that "[i]f an appeal on the merits of the case is taken, the court may rule on the claim for fees, may defer its ruling on the motion, or may deny

the motion without prejudice, directing under subdivision (d)(2)(B) a new period for filing after the appeal has been resolved.”

DISCUSSION

Here, the Undersigned finds that the interests of justice would be better served by denying the motion *sub judice* without prejudice to Defendants’ ability to renew the motion, if appropriate, after the pending appeal concludes. Indeed, “if awarded at this juncture, [the award] may need to be recalculated, repaid, reimbursed, or offset, depending on the outcome of the appeal.” *Yellowpages Photos, Inc. v. YP, LLC & Print Media LLC*, No. 8:17-CV-764-T-36JSS, 2020 WL 6729719, at *2 (M.D. Fla. Oct. 29, 2020), *report and recommendation adopted sub nom. Yellowpages Photos, Inc. v. YP, LLC*, No. 8:17-CV-764-T-36JSS, 2020 WL 6728846 (M.D. Fla. Nov. 16, 2020) (citing *Truesdell v. Thomas*, No. 5:13-CV-552-OC-10PRL, 2016 WL 7049252, at *3 (M.D. Fla. Dec. 5, 2016)). At a minimum, “[i]f the district court were to resolve the fee and cost issue while an appeal remains pending, it would be asked to repeat the procedure following the appeal.” *Bowers v. Universal City Dev. Partners, Ltd.*, No. 6:03-CV-985-ORL-18JGG, 2005 WL 1243745, at *2 (M.D. Fla. May 19, 2005). In light of the pending appeal and to conserve judicial resources, the Undersigned recommends that Defendants’ Motion to Tax Costs (Doc. 72) be denied without prejudice at this time. *See Sowers*, 2018 WL 11025038, at *1.

CONCLUSION

For these reasons, the Undersigned **RESPECTFULLY RECOMMENDS** that Defendants' Motion to Tax Costs be **DENIED without prejudice** to Defendants' ability to renew the motion, if appropriate, after the pending appeal concludes.

RESPECTFULLY RECOMMENDED in Chambers in Ft. Myers, Florida on November 24, 2020.



Mac R. McCoy
United States Magistrate Judge

NOTICE TO PARTIES

A party has fourteen days from this date to file written objections to the Report and Recommendation's factual findings and legal conclusions. A party's failure to file written objections waives that party's right to challenge on appeal any unobjected-to factual finding or legal conclusion the district judge adopts from the Report and Recommendation. *See* 11th Cir. R. 3-1.

Copies furnished to:

Counsel of Record
Unrepresented Parties